Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

NO. 87-594

SHELDON LOVELACE,
Petitioner

vs.

ACME MARKETS, INC.,
Respondent

PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITIONER'S REPLY BRIEF TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The sole basis of opposing the Petition for Writ of Certiorari is the claim that the issue "does not raise any issue beyond the question of fact interpretation that has already been . . . decided." Brief in Opposition at page 4.

The instant case did not involve a dispute as to the historical or narrative facts. Indeed, those facts were established by counsel's affidavit. See Appendix, pp. A-21 to A-26. United States for Use and Benefit of DeLoss v. Kenner General Contractors, Inc., 764 F.2d 707, 709 (9th Cir. 1985); Woods v. Partenreederei M.S. Yankee Clipper, 112 F.R.D. 115 (D. Mass. 1986).

The dispute does not center over some application of discretion in a matter left to the court's discretion. Rather, the Court of Appeals for the Third Circuit eschewed any discretion, holding that reliance on a specially appointed process server was "misplaced" and "cannot be excused if the legislative intent for a strict interpretation of Fed. R. Civ. P. 4(a) is not to be rendered illusory." (Emphasis added). Appendix p. A-10. Thus, whatever inferences might be placed on the narrative facts, the legal result was dictated by the erroneous legal rule applied, and it is that erroneous legal rule which is subject to review. If the view of Rule 4(a) and (j) advanced by Petitioner in his Petition, and credited by the leading commentator (Siegel) on Rule 4 as the true legislative intent

of the drafters of Rule 4(a) and 4(j), is the correct construction of Rule 4(a) and (j), then reversal and remand are required to make the determination of "good cause" in accordance with that construction, stated by Siegel in Petitioner's Petition for Writ of Certiorari at pp. 11-12, 16-17, 20-21 thereof.

Any fact finding, or even exercise of discretion, based on an erroneous legal standard, cannot stand, and is subject to review. Tyler v. INA, 539 F.2d 1072 (5th Cir. 1976). There is plenary review of the trial court's choice and interpretation of legal precepts and its application of those legal precepts to the historical facts. Universal Minerals, Inc. v. C.A. Hughes & Co., 669 F.2d 98 (3rd Cir. 1981). Erroneous conclusions of law may always be set

aside. Smith v. United States, 336 F.2d 165 (4th Cir. 1964); McLeod v. Local 459, AFL-CIO, 300 F.2d 237 (2d Cir. 1962); Robinson v. United States, 518 F.2d 1105 (9th Cir. 1975).

The critical reliance which the small law firm must place on the independent process server is illustrated by Baden v. Craig-Hallum, Inc., 115 F.R.D. 582 (D. Minn. 1987). Therein, the Court stated:

> "Plaintiff did make diligent efforts to serve Derksen. Plaintiff hired a process server who attempted to serve Derksen . . . ." 115 F.R.D. at 585.

In assessing due diligence in that case, the Court noted that Plaintiff's counsel employed a private legal process firm, and upon receiving a "not found" from the process server, tried mail service.[1] The Baden Court indicated that

"where Plaintiff has demonstrated some diligence and a reasonable effort to effect service" that he had shown "good cause for delay." 115 F.R.D. at 587.

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[1]In the instant case the private process server fraudently reported that service had been made, which lulled Plaintiff into the belief that no further efforts to make service were required. Cf. Ditkof v. Owen-Illinois, Inc., 114 F.R.D. 104 (E.D. Mich. 1987); Jordan v. United States, 694 F.2d 833 (D.C. Cir. 1982).

No case has required, or even approved, the use of several methods to effectuate service simultaneously in the hopes that one or more would be effective. Such a rule would impose a serious hardship on the small practitioner, for no good purpose, and, in small cases, such as the instant one, (the EEOC limit on damages is two years salary) for a worker on a moderate salary would discourage the attorney from taking such cases.

The need for guidance in applying Rule 4(j) is well illustrated by the case of Gordon v. Hunt, 116 F.R.D. 313 (S.D. N.Y. 1987).[2] The Gordon Court stated the rule, thusly:

> "The first factor which courts have considered in determining whether good cause exists for service outside the 120-day limit is whether the delay in service was "the result of mere inadvertence," or whether there has been a "reasonable effort" to effect service. Geller v. Newell, 602 F.Supp. 501, 502 (S.D. N.Y. 1984).
>
> The second factor was considered in a Rule 41(b) motion to dismiss for failure to prosecute based on untimely service--prejudice to the defendant presents a more difficult question. Courts are divided on the issue whether lack of prejudice to the defendant should be considered as a factor in determining whether good cause exists for untimely service under the present Rule 4(j). At least one court has taken the position that because the amended Rule 4(j) on its

face does not require a showing of prejudice on the part of the moving party, a showing of prejudice is irrelevant to a determination of good cause for tardy service. See Quann, 112 F.R.D. at 661; . . . . However, other courts, including two in this circuit, have considered lack of prejudice as a pertinent factor in determining whether good cause exists. See e.g., United States v. Jack Cozza, Inc., 106 F.R.D. 264, 268 (S.D.N.Y. 1985); Geller v. Newell, 602 F.Supp. at 502; Peters v. E.W. Bliss Co., 100 F.R.D. 341, 348 (E.D. Pa. 1983). . . . . However, it would seem appropriate that a determination of "good cause," which is a

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[2]In Gordon dismissal was granted where:

> "[A]ccording to plaintiffs counsel's own account, no effort was made to serve Fustok in Korwek until February 1983, over a year after the action was filed. Because the Korwek plaintiffs made no efforts to serve Fustok within the 120-day

legal term traditionally broadly defined, should take into account an equitable consideration such as hardship--or lack thereof--to the defendant. Accordingly, any lack of prejudice will be considered a relevant factor here."

116 F.R.D. at 319, 321.

In the instant case no prejudice was ever claimed by Respondent, and prejudice, or lack thereof to Respondent, was not considered by either the District Court or the Court of Appeals.[3]

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[2]cont'd period, and have not explained their failure to do so, a determination of "good cause" for failure to effect timely service would be an abuse of discretion."

116 F.R.D. at 325.

[3]Petitioner also argued before the District Court and the Court of Appeals that this equitable factor of prejudice or lack thereof should be considered, citing United States for Use & Benefit of Arrow Electronics, Inc. v. G.H. Coffey

There was also a subsidiary question that was involved before the District Court and Court of Appeals, and raised by Respondent at p. 6 of its Brief in Opposition to the Petition for Writ of Certiorari as to whether Petitioner was bound to use the process server appointed by the District Court under Local Rule 29 (see P. 4 of the Petition for Writ of Certiorari), or even if not (as the Court of Appeals subsequently held in its Opinion, Appendix p. A-7), whether counsel might anticipate such a requirement and believe that service by another might be a nullity. Cf. Sieg v. Karnes, 693 F.2d

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[3]cont'd Co., Inc., 100 F.R.D. 413 (D. Me. 1983) (Delay of a few months excused); Moorehead v. Miller, 102 F.R.D. 834 (D. V.I. 1984). Indeed, in Thompson v. Ralston Purina Co., 599 F.Supp. 756 (W.D. Mich. 1984) failure to serve by a pro se plaintiff was excused on the basis

803 (8th Cir. 1982); compare Rule 4(c)(2)(A) and (B), and Rule 4(c)(3), Federal Rules of Civil Procedure (Local Rule 29,[4] in practice, had been used routinely, prior to the amendment to Rule 4, to provide service by retained private process servers, since the local Marshal's office did not have the staff to make such service; this practice of

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[3]cont'd that the employer had received the notice from the EEOC of the right to sue, so that the employer was aware of the claim. The respondent-employer in this case had also received such notice.

[4]The process server was specially appointed to make service by an Order issued by the Clerk of Court, pursuant to Rule 29 of the United States District Court for the Eastern District of Pennsylvania.

By letter of April 1, 1986, the District Court granted an extension of time until April 15, 1986, to

using Local Rule 29 continued after the

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[4]cont'd effectuate service. Although counsel requested that he be specially appointed to make service, the Court failed to appoint him. Counsel then advised the process server of the time limit in the letter of the Court, and the process server agreed that he would make service on or before that date.

The process server did not make service by that date, but did make service on April 23, 1986, eight days after the date specified in the letter of the Court.

At the time counsel requested his own appointment as process server, it was not at all clear whether, as the Court of Appeals has now decided, that once a process server was appointed someone else could make service. See Burroughs Corp. v. Carsan Leasing Co., 99 F.R.D. 528 (D. N.J. 1983); Heritage House Frame & Moulding Co., Inc. v. Boyce Highlands Furniture Co., Inc., 88 F.R.D. 172 (D. N.Y. 1980), and compare Fleeger v. Clarkson Co., Ltd., 86 F.R.D. 388 (D. Tex. 1980). Service by an unauthorized person would be a nullity. Sieg v. Karnes, 693 F.2d 803 (8th Cir. 1982).

Further, even if counsel were, under the facts of this case, required to personally make the service, he would have to consider that such service would be likely challenged.

amendment to Rule 4).

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[4]cont'd Jugolinija v. Blue Heaven Mills, Inc., 115 F.R.D. 13 (S.D. Ga. 1986)(Court in upholding service by attorney noted that "it may be that allowing for service of a summons and complaint by a party's attorney is inappropriate or undesirable in certain respects," but upheld the service in the "absence of authority."); contra, In re Evanishyn, 1 F.R.D. 202 (D.N.Y. 1939)(Counsel may not make service).

Thus, if counsel's actions are reasonable, even if he acted on what turned out to be an erroneous interpretation of the law, his actions should not be deemed "unreasonable" in retrospect.

Finally, even as to the eight day late service, the omission and misconduct of the process server is involved.

If the District Court had applied the construction of Rule 4(a) and (j) advocated by Petitioner as the correct construction, it would have had to evaluate the fraud and misconduct, and could have excused all or a substantial part of the initial 120 day period, giving a corresponding additional period which would have likely included the period when actual service was made. In the alternative, the District Court could have concluded that the short eight day period beyond the additional 15 day period should be excused. In addition, the

Since the sole issue upon which review is sought in this Honorable Court is the question of the construction of Rule 4(a) and (j), Federal Rules of Civil Procedure, as to whether "good cause" under Rule 4(j) may include the fraud of the process server, and whether Rule 4(a) makes an independent process server a plaintiff's agent, such that the fraud or omission of the process server cannot legally constitute "good cause," the subsidiary, background questions about the existence and application of Local Rule 29, need not be addressed. The legal basis for the

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[4]cont'd total lack of prejudice to Respondent could have been considered by the District Court in determining whether, in light of the conduct of the process server, the short time periods involved herein, considered with Petitioner's good faith efforts to effectuate prompt service, should be good cause to excuse service made within

decision of both the District Court and the Court of Appeals was that Rule 4(a) and (j) mandated that a plaintiff was required to "ensure" service within 120 days, so that the fraud and omissions of the process server employed by plaintiff did not constitute "good cause," legally, to excuse late service, whether or not there was any prejudice suffered by the defendant.

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[4]cont'd 175 days. (55 over the 120 day period, so that an excuse for 55 days only would be render service timely, or only eight days beyond the extension, so that an excuse of eight days would suffice).

Even if the District Court could have concluded that service was not timely made under a correct application of Rule 4(a) and (j), if it reached that result on the basis of an application of an erroneous rule, reversal is required and the District Court should apply the correct rule.

If the construction of Rule 4(a) and (j) made by the Court of Appeals and District Court is erroneous, as Petitioner urges (pp. 9-25 of the Petition for Writ of Certiorari), then certiorari should be granted, the dismissal of Petitioner's suit should be reversed, and the case remanded. If, on application of the correct legal standard, there is any remaining viability to the motion to dismiss, the District Court, in the first instance, would review the case and determine the question in the light of the correct legal standard.

Because there is no consensus within the Circuits as to what construction should be placed on Rule 4(a) and (j), Federal Rules of Civil Procedure, and because there is respectable authority that the construction of Rule 4(a) and (j) made by the Court of Appeals for the

Third Circuit is erroneous, and not consonant with the intent of the authors of the amendment to Rule 4(a) and (j), and this Honorable Court is the only authority which can resolve this question of construction, this Honorable Court should grant certiorari, and decide the narrow legal question presented for review.

CONCLUSION

WHEREFORE, Petitioner prays that this Honorable Court grant the Petition for Writ of Certiorari.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November 1987, three true and correct copies of Petitioner's Reply Brief to Respondent's Brief in Opposition to the Petition for Writ of Certiorari were served by depositing the same with the United States Post Office, First Class Mail, Postage Prepaid, addressed to Respondent's attorney of record, Herbert G. Keene, Jr., Esquire, Stradley, Ronon, Stevens & Young, 1100 One Franklin Plaza, Philadelphia, Pennsylvania 19102.

I further certify that all parties required to be served have been served.

Harvey Lee Anderson

HARVEY LEE ANDERSON
Attorney for Petitioner